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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-632

SILVIO J. IRALI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the effect of his activities on interstate commerce was insufficient to render him guilty of extortion under 18 U.S.C. 1951; (2) that there was a misjoinder of the substantive count with the perjury count; (3) that it was a prejudicial abuse of the grand jury process to call him before that body, since he was a "putative defendant"; (4) that the evidence was insufficient to sustain his conviction; and (5) that the trial court committed several errors in its instructions to the jury.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of extortion, in violation of 18 U.S.C. 1951 (Hobbs Act), and one count of making a false declaration before the grand jury, in violation of 18 U.S.C. 1623. He was sentenced to consecutive terms of one year's imprisonment. The court of appeals affirmed (Pet. App. 1a-14a).

The evidence, detailed in the opinion of the court of appeals, showed that Mrs. Geraldine Svedman purchased a tavern and applied for a liquor license. Petitioner, then a principal clerk in the liquor license department of the City Collector's office, told Mrs. Svedman that he might be able to help her obtain the license (Pet. App. 2a). When Mrs. Svedman called petitioner at his office, petitioner told her that "Greenwich [the police officer assigned to investigate the application] wanted $500 for his troubles" (Pet. App. 2a). She said that she did not "have that kind of money." Petitioner responded, according to Mrs. Svedman's testimony, "that because he was a friend of [hers], he would talk to Officer Greenwich again, but that all the license officers down there, that's the way they do things." She additionally stated that he said "that Greenwich was a hardnose and he wouldn't waive any money" (Pet. App. 2a-3a).

After two subsequent telephone calls, petitioner claimed that Greenwich would settle for $150. Mrs. Svedman thereupon borrowed $150 and gave it to petitioner (Pet. App. 3a). Petitioner told her, "For sure, you will get your license now." She received her license five days later and immediately opened her tavern for business (Pet. App. 3a).

The evidence established that Mrs. Svedman purchased liquor for her tavern from three Illinois distributors who had purchased their supplies from out of state (Pet. App. 3a).

To prove the false declaration count of the indictment, the government introduced the grand jury transcript of petitioner's testimony, in which he denied having ever received $150 from Mrs. Svedman in connection with the issuance of her liquor license (Pet. App. 3a).

1. Petitioner contends that since the liquor sold to Mrs. Svedman's tavern had come to rest in Illinois before its sale and distribution and thus was no longer part of interstate commerce, his activities did not interfere with interstate commerce so as to come within the ambit of 18 U.S.C. 1951. As the court of appeals noted in *United States* v. *Gill*, 490 F.2d 233, 236 (C.A. 7), certiorari denied, 417 U.S. 968, however, Section 1951 "not only forbids extortion which interferes with interstate commerce but also extortion which *affects* interstate commerce" (emphasis supplied).[1] "The power of Congress * * * extends to those activities intrastate which so affect interstate commerce * * * as to make regulation of them appropriate means to the attainment of * * * the exercise of the granted power of Congress to regulate interstate commerce." *United States* v. *Darby*, 312 U.S. 100, 118. See also *United States* v. *Pacente*, 490 F.2d 661 (C.A. 7),

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[1]Petitioner's reliance on *United States* v. *Enmons*, 410 U.S. 396, is misplaced. In *Enmons*, the Court held that Section 1951 could not be used to prosecute labor leaders who, during a legal strike, participated in acts of violence in order to persuade the struck company to agree to the strikers' demands. This decision was not based upon any lack of interference with interstate commerce but, rather, upon the Court's conclusion that Section 1951 "limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *Id.* at 400. Since the strikers enjoyed a legal right to strike and demand higher wages, the "property" sought through the acts of violence was not something to which they had "no lawful claim."

affirmed *en banc*, 503 F.2d 543 (C.A. 7), certiorari denied, No. 74-243, December 9, 1974; *United States* v. *Gill*, *supra*; *United States* v. *DeMet*, 486 F.2d 816 (C.A. 7), certiorari denied, 416 U.S. 969.

Petitioner contends in the alternative that his activities could have had only a *de minimus* impact upon interstate commerce. But Section 1951 does not entail a *de minimus* limitation. It provides for sanctions against anyone who "in any way" affects interstate commerce. See *United States* v. *Augello*, 451 F.2d 1167, 1169 (C.A. 2); *United States* v. *DeMet*, *supra*, 486 F.2d at 822 and cases cited therein.

Petitioner contends that the extortion and perjury counts were joined in violation of Rule 8(a), Fed. R. Crim. P. It is well established, however, that where a commonality of proof exists between the substantive and perjury counts, as here, "the conspiracy and perjury offenses were surely 'connected together' for purposes of Rule 8(a)." *United States* v. *Sweig*, 441 F.2d 114, 119 (C.A. 2), certiorari denied, 403 U.S. 932.[2] See also *United States* v. *Pacente*, *supra*.

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[2]The Second Circuit has subsequently interpreted *Sweig* as holding both that commonality of proof of the conspiracy and perjury crimes permit denial of a Rule 14 pretrial motion for separate trials, and that a defendant who fails to renew his motion for severance of the counts on the eve of trial may not raise the claim on appeal. *United States* v. *Carson*, 464 F.2d 424, 436 (C.A. 2), certiorari denied, 409 U.S. 949. Petitioner here failed at trial to move to sever the two counts and raised the argument for the first time on appeal.

Alternatively, petitioner contends that, although he did not so move at trial, there should have been a severance of the counts despite the commonality of proof between them, because it was prejudicial for the jury, in considering whether to convict him on the substantive offense, to know that the grand jury indicted him for making perjurious exculpatory statements in connection with the same offense. However, as the court noted in *Pacente*, *supra*, 503 F.2d at 547, "it is an unwarranted over-refinement to speculate that * * * the trial jurors, acting together, will give weight to the conclusion reached by the grand jurors and fail to decide the issues of fact according to their own proper evaluation of the evidence."

3. Petitioner contends that the evidence adduced at trial was insufficient to sustain his conviction for extortion. As the court of appeals stated, however (Pet. App. 7a-9a):

> There was sufficient evidence * * * for the jury to convict [petitioner]. First, contrary to [petitioner's] contention, it was not unreasonable for Mrs. Svedman to believe that she would not get her liquor license until she paid the money. Although the victim may have first approached [petitioner] about help in the processing of her application due to the delay, the evidence established that he was the one who raised the necessity of a payment to Officer Greenwich of "$500 for his troubles." It is also clear that [petitioner] relayed or concocted further demands when Mrs. Svedman balked and that he finally suggested and accepted $150. The day that Mrs. Svedman received her license, she opened her tavern. A denial or even a delay in obtaining her license meant lost business. According to the evidence, the average liquor license is obtained within ten days

to three weeks of application. Here the payment was made on the twenty-third day after the application was filed and the license was then received five days later. It would be permissible for the jury to infer that the victim had a reasonable fear of economic harm if she did not pay [petitioner].

Second, [petitioner] contends that there was no evidence that he obtained this money through his official position in the liquor license department of the City Collector's office. This department did not have the responsibility for approving liquor licenses, but did have the responsibility for processing them by sending them to the building department to consider whether the zoning was proper, to the police department for its recommendation on the application itself, to the license commisioner for decision, and then to the City Clerk for issuance. * * * A delay in this ministerial duty could cost the license applicant in lost revenue due to inability to open a tavern.

Mrs. Svedman knew [petitioner] worked in the city hall on liquor licenses. * * * [T]he person on whose behalf he said he spoke, Officer Greenwich, had an official position in which he could recommend that the license not be issued. Accordingly, there was sufficient evidence for the jury to have found that [petitioner] * * * affected interstate commerce by extortion.

4. Petitioner contends that the trial court erred in its instructions concerning aiding and abetting, extortion under color of official right, and extortion by fear of economic harm.

a. The trial judge on his own motion suggested that an instruction on aiding and abetting be given. Petitioner opposed such an instruction. The instruction which was given read as follows (Pet. App. 12a):

> Whoever aids, abets, counsels, commands, induces or procures the commission of a crime is punishable as a principal. In order to aid or abet the commission of a crime a person must associate himself with the criminal venture, participate in it and try to make it succeed.

Petitioner contends that the court erred in giving this instruction because there was no evidence to support a charge of aiding and abetting. As the court of appeals stated, however, (Pet. App. 12a-13a):

> The evidence itself lends itself to giving of this instruction because the testimony established that [petitioner] represented that it was Officer Greenwich who wanted the money and because it was he, [petitioner], who served as the go-between both in reducing the demanded sum as well as in collecting the payoff.

It is, moreover, well established that an indictment need not specifically charge the defendant with aiding and abetting to support a jury verdict on this theory. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-620; *United States* v. *Adams*, 454 F.2d 1357, 1358, n. 1, certiorari denied, 405 U.S. 1072. Indeed, the instruction given here was that which was approved in *Nye & Nissen, supra*, 336 U.S. at 618-619.

b. The court also instructed the jury as follows (Pet. App. 13a-14a):

> If a public employee obtains money from another by fear induced by wrongful *fear* of official right, then that is sufficient to satisfy the requirements of the law that money he obtained by means of extortion [emphasis added by court of appeals].

Since this instruction, as presented at the conference relating to the instructions, employed the word "use" rather than the word "fear," a mistake was made either by the trial judge in reading the instruction or by the court reporter in transcribing it. However, as the court of appeals stated (Pet. App. 14a), "* * * we assume the substitution was an inadvertent mistake. In any event, we do not consider this a basis for reversal since the mistake was not to the defendant's detriment and defendant never interposed an objection."

c. Finally, the jury was instructed as to two theories of extortion: the obtaining of money either (1) induced by wrongful use of fear of economic harm or (2) under color of official right. Petitioner, relying upon the prosecutor's statement at the instruction conference that "[w]e are proceeding with an official rights theory of extortion" (Pet. App. 6a), contends that the government thereby waived the alternative theory. As the court of appeals stated, however (Pet. App. 6a):

> * * * [petitioner] interprets the statement out of context. It is clear from the record that Government counsel made the statement while arguing about an instruction dealing with the *reasonableness* of the fear of economic harm. He did not waive the theory that the extortion was by fear of economic harm; he emphasized only that he was also proceeding under color of official right and that fear was not an element of the crime under that theory.

In any event, as the court of appeals concluded, the evidence was sufficient to support petitioner's conviction under either theory (Pet. App. 7a-9a).

5. Finally, petitioner contends that it was a prejudicial abuse of the grand jury process for the government to summon him, a putative defendant, before the grand jury, and thereby to "entrap" him into committing perjury (Pet. 23).

Even if the government possessed sufficient evidence to indict petitioner prior to calling him before the grand jury, however, there is no basis in the history or logic of the Fifth Amendment for barring the grand jury from considering the testimony of a potential defendant. "It may well develop upon further investigation that others are involved or that those first suspected have explanations or proof which absolve them. Obviously many investigations would be incomplete and superficial if the grand jury failed to call those persons who appear to know the most about the matters under inquiry. * * * It is altogether in the public interest that grand juries should inquire with care and thoroughness before they file charges against anyone." *United States* v. *Sweig*, *supra*, 441 F.2d at 121.

Here, the grand jury was investigating possible violations of the Hobbs Act by Chicago police officers. Petitioner was likely to have information critical to determining whether Officer Greenwich was engaged in extortion. An investigation of such alleged conduct was well within the proper scope of the grand jury's investigation. *United States* v. *Cefalu*, 338 F.2d 582 (C.A. 7).

This case is unlike two cases in which we have petitions for writs of certiorari pending, *United States* v. *Wong*, C.A. 9, No. 74-1636, decided September 23, 1974, No. 74-635, and *United States* v. *Mandujano*, 496 F.2d 1050 (C.A. 5), No. 74-754, both of which allow a perjurer

to obtain suppression of his grand jury testimony in a perjury prosecution because he or she had been "improperly compelled" to testify by not receiving full *Miranda* warnings (*Mandujano*) or not understanding the warnings given (*Wong*). While we believe no *Miranda* warnings are required for grand jury witnesses, petitioner here was in fact given full *Miranda* warnings prior to testifying before the grand jury (Transcript of the Grand Jury proceeding, August 30, 1972, pp. 2-4).

Nor is this a case like *United States* v. *Nickels*, 502 F.2d 1173 (C.A. 7), petition for a writ of certiorari pending, No. 74-735,[3] which is at odds with *Wong* and *Mandujano* because it makes perjury punishable even when the witness has been improperly compelled by reasonable fear that invocation of his privilege will lead to loss of his government job. Here, as the court of appeals noted (Pet. App. 11a, n. 8), petitioner offered no evidence that the City Collector's Office, where he was then employed, had a rule analogous to Rule 51 of the Chicago Police Department requiring dismissal of any police officer who invoked his Fifth Amendment privilege before a grand jury.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[3]We did not oppose the granting of a writ of certiorari in *Nickels* because of its conflict with *Wong* and *Mandujano*.